United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

76-1284

To be argued by
MICHAEL HARTMERE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1284

UNITED STATES OF AMERICA,

Appellant,

—v.—

SYLVIO J. GRASSO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF FOR THE APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1284

U.S.A.,
Appellant

v.

SYLVIO J. GRASSO,
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue, Brooklyn, New York

That on the 1st day of August, 1978, deponent served the within Supplemental Brief

upon Jon G. Rothblatt, Esq., Rothblatt, Rothblatt, Seijas & Peskin, 232 West End Avenue, New York, N. Y. 10023

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 1st day of August, 1978

PATRICIA D. O'HARA, Notary Public
State of New York, No. 31-165498
Qualified in New York County
Cert. Filed in Kings County
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Patricia D. O'Hara

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SUPPLEMENTAL BRIEF FOR THE APPELLANT

Statement of the Case

On April 16, 1975, a Federal Grand Jury sitting at Hartford, Connecticut, returned a true bill of indictment (H-75-52) charging the defendant, Sylvio J. Grasso, with violation of Title 26, United States Code, Section 7201, in three counts. The indictment charged that the defendant had knowingly and wilfully attempted to evade and defeat a large part of his income tax liability for the years 1969, 1970 and 1971.

On April 28, 1975, the defendant entered pleas of not guilty to all three counts of the indictment.

A jury was empanelled and sworn on November 5, 1975, and trial by jury commenced on November 6, 1975, in United States District Court, Hartford, before the Honorable T. Emmet Clarie, Chief United States District Judge. On November 26, 1975, the Court declared a mistrial, *sua sponte.*

On January 6, 1976, the case appeared on a jury assignment calendar for the United States District Court, New Haven, before the Honorable Robert C. Zampano, United States District Judge. On January 7, 1976, defendant filed his memorandum in support of dismissal of indictment on grounds of double jeopardy. On February 11, 1976, oral arguments were heard on defendant's motion to dismiss, after which Judge Zampano reserved decision.

On May 13, 1976, Judge Zampano granted defendant's motion to dismiss. *United States* v. *Grasso*, 413 F. Supp. 166 (D. Conn. 1976). Thereafter, a timely Notice of Appeal was filed by the Government. Oral argument of the Government's appeal was heard by this Court on October 18, 1976. On March 9, 1977, this Court affirmed the decision dismissing the indictment. *United States* v. *Grasso*, 552 F.2d 46 (2d Cir. 1977). Judge Timbers filed a dissenting opinion to that decision. On June 21, 1977, this Court denied reconsideration *en banc*. *United States* v. *Grasso*, 568 F.2d 899 (2d Cir. 1977). Judge Timbers also dissented from the denial of reconsideration *en banc*.

On May 9, 1977, the Government filed its Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit in the Supreme Court of the United States (No. 76-1543, October Term, 1976). On June 26, 1978, the United States Supreme Court granted the petition for a writ of certiorari and remanded the case to this Court for further consideration in light of two recent decisions, *United States* v. *Scott*, 437 U.S. —, 98 S.Ct. 2187 (1978); and *Arizona* v. *Washington*, 434 U.S. —, 98 S.Ct. 824 (1978). *United States* v. *Grasso*, No. 76-1543, 46 U.S.L.W. 3792 (U.S. June 27, 1978).

Statutes Involved

§ 7201. Attempt to evade or defeat tax

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

United States Constitution, Amendment V

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

Issues Presented

1. Did the defendant surrender his "valued right to have his trial completed by a particular tribunal" by seeking and obtaining the termination of the proceedings against him in the trial court?

2. Did the trial court act within permissible bounds of its discretion in declaring a mistrial, *sua sponte?*

Statement of Facts

The Government here adopts and incorporates by reference the Statement of Facts contained within the Brief For The Appellant in this case which was previously filed with this Court.

ARGUMENT

I. The Defendant Surrendered His "Valued Right To Have His Trial Completed By A Particular Tribunal" By Seeking And Obtaining The Termination Of The Proceedings Against Him In The Trial Court.

The United States Supreme Court recently held that ". . . where a defendant himself seeks to have his trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so" does not offend the Double Jeopardy Clause. *United States* v. *Scott*, 437 U.S. —, 98 S.Ct. 2187, 2199 (1978). The Court continued that " 'the lessons of experience indicate that Government appeals from midtrial dismissals requested by the defendant would significantly advance the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without enhancing the possibiilty that even though innocent he may be found guilty.' " *Id.* In so ruling the Supreme Court expressly overruled its holding in *United States* v. *Jenkins*, 420 U.S. 358 (1975).

The present case is clearly controlled by *Scott*. In *Scott*, the defendant both before trial and twice *during trial* moved to dismiss two counts of the indictment on the grounds that he had been prejudiced by preindictment delay. *United States* v. *Scott*, *supra* at 2190. At the close of all the evidence, the trial court granted the defendant's motion. The Government sought to appeal those dismissals but the United States Court of Appeals for the Sixth Circuit, relying on *United States* v. *Jenkins*, *supra*, held that *any further prosecution* of the defendant was barred by the Double Jeopardy Clause of the Fifth Amendment and dismissed the Government's appeal. *United States* v. *Scott*, 544 F.2d 903 (6th Cir. 1976). In the present case during the presentation of the Government's *rebuttal evidence*, the defendant moved to dis-

miss the indictment on the grounds of prosecutorial and Government misconduct (alleging that Internal Revenue Service agents and the prosecutor had threatened a witness into committing perjury). (Tr. 907-909).[1] A two day hearing on the allegations of misconduct was held out of the jury's presence, subsequent to which the defendant again moved to dismiss the indictment on the grounds of Government misconduct. (App. 23, 24).[2] The trial court denied the defendant's motion to dismiss. (App. 33). However, his concern that the defendant receive a fair trial having been stimulated by the defendant, *United States* v. *Gentile*, 525 F.2d 252, 255 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976), Chief Judge Clarie declared a mistrial, *sua sponte*.

In *Scott*, the Supreme Court expressly overruled *Jenkins* since "[i]t placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empanelled to try him so as to include those cases *where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence.*" *United States* v. *Scott*, *supra* at 2191. (Emphasis supplied). This was clearly what happened in the present case. Here the defendant sought to terminate the trial before verdict on the grounds of Government misconduct (clearly unrelated to factual guilt or innocence) which was alleged to have occurred during the trial itself.

The decision to attempt to terminate the trial prior to a factual finding by the jury was obviously a deliberate and voluntary choice of the defendant. Indeed, after the Government had objected to the declaration of a mistrial, the defendant's attorney stated "Of course, your Honor,

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[1] References marked "Tr. ..." refer to the transcript of proceedings in the trial court before the Honorable T. Emmet Clarie, Chief United States District Judge.

[2] References marked "App. ..." refer to the Appendix For The Appellant previously filed with this Court.

the defendant agrees with everything that your Honor has decided, except your Honor's decision to declare it a mistrial, we would renew our request for judgment of acquittal." (App. 35). This Court has already found that the defendant never objected to the declaration of a mistrial, *United States* v. *Grasso*, 552 F.2d 46, 50 (2d Cir. 1977), and therefore that he never asserted his valued right to have his trial completed before the empanelled jury. Judge Timbers, in his dissenting opinion, stated that he "would hold that Grasso's failure to object to the mistrial constitutes a bar to his subsequent double jeopardy claim," *Id.* at 56, and that in order to claim the protection of the double jeopardy clause the defendant should at least be required to asert "his valued right to have his trial completed by a particular tribunal". *Id.* at 55. In view of *United States* v. *Scott*, *supra*, Judge Timbers' dissenting opinion would appear to be an accurate statement of the law. This is especially true in view of the fact that here the mistrial was declared "to remedy a prejudicial situation brought about by [defense] counsel's negligent failure to examine his own records." *United States* v. *Grasso*, *supra* at 55 (Timbers, J., dissenting).

In *Scott*, the Supreme Court stated:

> We think that in a case such as this the defendant, *by deliberately choosing to seek termination of the proceedings against him* on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, *does not relieve a defendant from the consequences of his voluntary choice.* . . . [the defendant] was thus neither acquitted nor convicted, be-

cause he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to jury which had been empanelled to try him.

* * * * *

We think the same reasoning applies in *pari passu* where the defendant, instead of obtaining a reversal of his conviction on appeal, obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence. He has not been "deprived" of his valued right to go to the first jury; only the public has been deprived of its valued right to "one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington, supra,* — U.S., at —, 98 S.Ct. at 832. *No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant.*

(Emphasis supplied; footnotes omitted) *United States* v. *Scott, supra* at 2197, 98.

In the present case the record demonstrates that at all times it was the defendant who very actively sought to terminate the proceedings against him prior to a jury verdict, a position which the Government at all times opposed. The Government submits that on the authority of *Scott* alone this Court should reverse the decision of the court below dismissing the indictment on double jeopardy grounds and remand this case for retrial.

II. The Trial Court Acted Within Permissible Bounds Of Its Discretion In Declaring A Mistrial, *Sua Sponte*.

This Court in affirming the dismissal of the indictment in the present case determined that before a trial court can properly declare a mistrial *sua sponte* based on the doctrine of "manifest necessity", the trial court must "make explicit findings, preferably after a hearing, that there are no reasonable alternatives to mistrial". *United States* v. *Grasso*, *supra* at 52. This Court concluded that:

> On the facts of the instant case, in which obvious alternatives to mistrial existed but were not explored, we hold that the double jeopardy clause bars retrial. . . . Any consideration of these reasonable possibilities was at best oblique. And, while the judge was acting with the very best of intentions, to protect the defendant from an unfair trial, the appropriate course was to solicit suggested alternatives from defense counsel.
>
> *Id.* at 53, 54. (Footnote omitted).

The same rationale has recently been rejected by the United States Supreme Court. *Arizona* v. *Washington*, 434 U.S. —, 98 S.Ct. 824 (1978).

In *Washington*, the defense counsel made prejudicial remarks in his opening statement. After the opening statement, the *prosecutor* moved for a mistrial which was denied by the trial judge. Two witnesses testified and the following morning the prosecutor renewed his mistrial motion. The state trial judge ultimately granted the prosecutor's motion. However, in declaring a mistrial the trial judge "did not expressly find that there was 'manifest necessity' for a mistrial; nor did he expressly state that he had considered alternative solutions

and concluded that none would be adequate." *Id.* at 828. The defendant having filed a petition for writ of habeas corpus in United States District Court based on an alleged violation of the double jeopardy clause, "the Federal District Judge noted that the Arizona trial judge had not canvassed on the record the possibility of alternatives to a mistrial and expressed the view that before granting a mistrial motion the judge was required 'to find that manifest necessity exists for the granting of it.'" *Id.* The United States Court of Appeals for the Ninth Circuit affirmed "because, absent a finding of manifest necessity or an explicit consideration of alternatives, the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict." *Id.* (footnotes omitted); *see also State of Arizona* v. *Washington*, 546 F.2d 829 (9th Cir. 1976).

The United States Supreme Court reversed stating:

> We are persuaded that the Court of Appeals applied an *inappropriate standard of review* to mistrial rulings of this kind, and attached undue significance to the form of the ruling. We therefore reverse.
>
> (Emphasis supplied)
> *Arizona* v. *Washington*, *supra* at 829.

The Government respectfully suggests that the majority opinion in the present case also "applied an inappropriate standard of review" to Chief Judge Clarie's articulated reasons for declaring a mistrial.

In *Washington*, the Supreme Court agreed with the District Court that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. However, the Court stated that this was an area where a trial judge's determination is entitled to special respect. The Court stated:

> In a strict, literal sense, the mistrial was not necessary. Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.
>
> *Id.* at 833.

In the present case, when declaring a mistrial *sua sponte*, Chief Judge Clarie stated:

> The Court has, as counsel may well imagine, has given considerable thought to this problem that has arisen. I never had the question arise in this form during a trial before.
>
> But the Court is of the opinion that because of the perjury issue injected into the trial by the testimony of Daniel Harris, that the defendant Grasso can not get a fair and impartial trial under the present circumstances.
>
> If the issue went to the jury it would not be whether or not he failed to pay his income taxes; the issue would be of selling narcotics, which is in and of itself a kind of abhorrent business to most every one of us. The issue would become whether or not he was selling narcotics, and whether or not this man, Daniel Harris, would be believed.
>
> To do that we'd have to go 'way back to the statement to the three Hartford policemen and the County Detective in '71, and get the facts as to how the story originated, with the documents which are in evidence. And we'd have to begin to review the testimony before the grand jury that Mr. Buckley deduced when he was prosecutor, or assistant prosecutor.

> We'd have to review the tape, as has been filed in evidence by counsel, which he procured at the jail. We'd have to review the statement of the I.R.S. witnesses, who went over and received from him what is claimed to be an apparent contradiction of the tape.
>
> And the issue of Mr. Grasso's income tax evasion would be well lost in the question of whether or not Daniel Harris committed perjury. That would be the nub of the case, rather than the question of the defendant's failure to pay his income taxes.
>
> For this reason the Court is of the opinion that the motion to dismiss would be denied, but that a mistrial should be ordered, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice, public justice, would be defeated.
>
> And that is what the Court is going to do. The Court is of the opinion that to permit the trial to go forward under the present circumstances would be an injustice to Mr. Grasso. (App. 31-33).

As evidenced by the above remarks, Chief Judge Clarie specifically found that there was a "manifest necessity" for declaring a mistrial in that he believed that the real issue in the case, whether the defendant attempted to evade income taxes, would be lost with the jury. In order to ensure the defendant's right to a fair and impartial jury, the trial court declared a mistrial *sua sponte*. Judge Clarie did so after listening to nine days of testimony at trial and two days of hearings on the defendant's motion to dismiss.

In *Washington*, the Supreme Court stated:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. *See Wade* v. *Hunter*, 336 U.S., at 637, 69 S.Ct., at 836.
>
> *Id.* at 834 (Footnotes omitted).

In the instant case Judge Clarie became aware of the prejudicial situation on November 21, 1975, and declared a mistrial five days later. Under the *Washington* standard this Court should fully credit Chief Judge Clarie's statements that he had given "considerable thought to this problem" and that a manifest necessity for declaring a mistrial existed, *i.e.* that the defendant could not get a fair and impartial trial under the existing circumstances. In the present case there is no doubt "about the validity of the conclusion that the possibility of bias justified the mistrial". *Id.* at 834.

Chief Judge Clarie fully explained his reasons for declaring a mistrial *sua sponte*. (App. 31-41). *Cf. Id.* at 836. Here there is no question that the trial judge exercised sound discretion in handling a very sensitive problem. Under *Washington*, Judge Clarie's decision is "entitled to great deference" by this Court. *Id.* at 834-35. While this Court previously stated that Judge Clarie "was acting with the very best of intentions, to protect the defendant from an unfair trial . . .", the majority opinion concluded that:

> Here, after argument on a motion to dismiss, the court declared a mistrial without hearing either side's views on the subject. *This was done with no mention of the alternatives raised above, and no findings on the question of alternatives*, the statement being only that the issues would be confused if the trial were continued. . . . As was true in *Jorn*, however well intentioned, the trial judge here "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial."
>
> (Citation omitted; emphasis supplied)
> *United States* v. *Grasso*, *supra* at 54.

The Government contends that Chief Judge Clarie made every effort to exercise sound discretion in determining that there was manifest necessity for the declaration of a mistrial, as evidenced by his remarks on this subject. (*See* Judge Timbers' dissenting opinion: *Id.* at 57 n. 6). When the appropriate standard under *Washington* is applied to the facts of this case, it is clear that the trial judge properly exercised his discretion and this Court should pay great deference to his decision.

The Government respectfully submits that when the facts of this case are considered under the proper standard enunciated by the United States Supreme Court in *Arizona* v. *Washington*, *supra*, the trial judge properly exercised his discretion in declaring a mistrial *sua sponte*.

CONCLUSION

Since the defendant actively and continuously sought the termination of the trial proceedings and never asserted his right to have his guilt determined by the jury and since the trial court exercised sound discretion in declaring a mistrial *sua sponte*, based on the authority of *United States* v. *Scott*, *supra*, and *Arizona* v. *Washington*, *supra*, the Government respectfully suggests that this Court should reverse the decision of the District Court dismissing the indictment and remand this case for retrial.

Respectfully submitted,

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